FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1575, 77-1648 and 77-1662

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, *ET AL.*,
Respondents.

Brief Amici Curiae of

TELEPROMPTER CORPORATION
NATIONAL CABLE TELEVISION ASSOCIATION, INC.
CAPE COD CABLEVISION CORP.
COMMUNICATIONS PROPERTIES, INC.
CONTINENTAL CABLEVISION, INC.
SAMMONS COMMUNICATIONS, INC.
SUMMIT COMMUNICATIONS, INC.
TELECABLE CORP.
TELE-COMMUNICATIONS, INC.
TELEVENTS, INC.
UA-COLUMBIA CABLEVISION, INC.
UNITED CABLE TV CORP.
VALLEY VIDEO SERVICE CO.
VIACOM INTERNATIONAL, INC.
WARNER CABLE CORP.

In Support of Respondents

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*Amici are filing this Brief with the consent of all parties, whose letters of consent have been filed with the Clerk.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

INTRODUCTION

The question posed by this case is crucial to the future of cable television and of mass media in the United States: May the Federal Communications Commission — consistent with the First Amendment and the limited jurisdiction over cable television implied in the Communications Act — require a cable television operator to provide "access" services on a first-come, first-served basis with no control by the cable operator over content?

We submit that the question must be answered in the negative. The FCC's access rules convert cable television operators into common carriers. Yet the FCC's authority to regulate cable television is only ancillary to its authority to regulate broadcasting, and the Commission is prohibited by statute from regulating broadcasters as common carriers. Moreover, the FCC's rules, by denying cable operators editorial discretion over what is carried on their channels, violate basic First Amendment rights recently reaffirmed by a unanimous decision of this Court in *Miami Herald Publishing Co. v. Tornillo.*[1] These rights, as two Courts of Appeals have agreed,[2] are as applicable to cable television as to newspapers.

That the access rules convert cable operators into common carriers is undisputed. Each cable television system serving 3,500 or more subscribers must supply any "available activated channel," on demand, to anyone requesting it for access services, whatever his commercial or other motivation. Cable operators have no control over who will provide programming on these channels or what the quality or content of that programming will be — even though such programming may preempt the cable operators' own programming.

[1]418 U.S. 241 (1974).

[2]*Midwest Video Corp. v. FCC,* 571 F.2d 1025, 1056 (8th Cir. 1978); *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 46 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977).

Under the access rules, the right of cable operators to program their channels is subordinated to the programming demands of access users. In its *Report and Order* promulgating the modified access rules, the Commission stated: "While we shall continue to encourage operators to originate, we do not believe that the public interest will be served if such efforts are at the expense of others who wish to provide access programming."[3] Not only would the Commission "scrutinize the actions of operators who, while providing their own programming, assert that their activated capability is insufficient to permit the leasing of a channel to potential competitors,"[4] it promised to "take whatever action is appropriate" to prevent cable operators from excluding leased access users from their facilities.[5] The Commission noted that if a cable operator had only one complete channel available for access services, the operator's decision to use the channel to provide his own "pay" programming would be considered evidence of bad faith.[6] In its *Memorandum Opinion and Order* on reconsideration of the 1976 Order, the Commission reaffirmed that access uses would be superior to the cable operator's origination efforts: "[W]e believe access programming should continue to have priority status over operator-originated programming where they compete for the final available channel on a cable system."[7]

[3]*Report and Order in Docket 20508*, 59 F.C.C.2d 294, 316 (1976), Petitioner's App. at 144. "Origination" programming is not available on over-the-air broadcast television stations, but is provided to the cable subscriber for no extra charge beyond the regular monthly fee for general cable television services. Origination programming may be produced locally or purchased nationally.

[4]*Id.*, Petitioner's App. at 144-45.

[5]*Id.*, Petitioner's App. at 145.

[6]*Id.* at 317, Petitioner's App. at 145. "Pay" programming is provided to subscribers for a monthly charge in addition to the regular charge for general cable television services.

[7]*Memorandum Opinion and Order in Docket 20508, on Reconsideration*, 62 F.C.C.2d 399, 404-05 (1976), Petitioner's App. at 182, 195.

Imposition of common carrier status fundamentally alters the nature of the cable television industry and seriously undermines its prospects for growth. Cable television no longer merely retransmits broadcast signals. To be sure, retransmission remains a primary function, but cable systems now also provide innovative, nonbroadcast programming to their subscribers. Cable operators produce their own programming and exercise editorial discretion in selecting programming from a variety of sources. Some examples of this new programming abundance follow:

> **Entertainment** — A number of program suppliers offer packages of first-run movies,[8] sports, and nightclub performances not available on broadcast television.[9] The major suppliers deliver their programming to cable systems nationwide by satellite.[10]
>
> **News** — UPI, AP, and Reuters currently supply daily news programming to cable systems.[11] A fourth service has proposed to deliver to cable systems by 1980 a 24-hour news channel with a live, "network-style" news format.[12]
>
> **Children's Programming** — One major cable company already delivers by satellite daily, commercial-free, non-violent children's programming for cable television.[13] A second company has an-

[8]Although some of these movies may be shown eventually on broadcast television, a movie shown uncut and without commercial interruption on a cable system is a substantially different artistic product than the same movie edited and shown with commercial interruptions on broadcast television.

[9]*See, e.g.*, *TVC*, Aug. 1978, at 25-27; *Vue*, June 26, 1978, at 25-26; *Vue*, June 12, 1978, at 32-33; *Vue*, Apr. 17, 1978, at 49-55.

[10]*Vue*, Sept. 11, 1978, at 33; *TVC*, Aug. 1978, at 25-27.

[11]*N.Y. Times*, July 6, 1978, at C19, col. 4; *Vue*, Aug. 21, 1978, at 24-29; *Vue*, May 1, 1978, at 76-79.

[12]*TVC*, Nov. 1, 1978, at 11.

[13]*Wall St. J.*, Dec. 5, 1978, at 20, col. 3; *TVC*, Nov. 15, 1978, at 44-51; *Vue*, May 1, 1978, at 86.

nounced plans to provide national delivery of up to 13 hours a day of children's programming. In addition, Walt Disney Productions supplies programming directly to cable companies.[14]

Political Coverage — Many cable systems will soon be offering gavel-to-gavel coverage of proceedings in the U.S. Congress.[15] A "two-way" cable system in Columbus, Ohio, recently carried a local town meeting and a public hearing of the U.S. Food and Drug Administration, with viewers using their home terminals to transmit their immediate responses to the government officials.[16] Many cable systems carry city council meetings and court proceedings live, and have provided local political candidates with "cable time."[17]

Religious Programming — Three major national suppliers of religious programming deliver the Gospel to cable television systems throughout the country.[18]

Cultural Programming — The potential of cable television to provide the viewer with unique cultural programming is being realised. Cable viewers already receive cultural programs, from high-school plays to opera.[19] And producers are expanding their cultural efforts to include, for example, taping off-Broadway productions.[20]

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[14] *Vue*, July 24, 1978, at 37.

[15] *N.Y. Times*, May 2, 1978, at 69, col.2.

[16] *TVC*, Nov. 1, 1978, at 25; *TVC*, Aug. 1978, at 12; *Vue*, July 24, 1978, at 40.

[17] *See, e.g., TVC*, Aug. 1978, at 40; *Vue*, May 1, 1978, at 80.

[18] *TVC*, Aug. 1978, at 27; *TVC*, May 1978, at 39-43.

[19] *See Newsweek*, July 3, 1978, at 64-65; *Vue*, June 26, 1978, at 26.

[20] Paul Kagan Assocs., *Pay TV Newsletter*, No. 133, Nov. 17, 1978, at 4.

Other Services — A new data bank service provides subscribers, over cable television channels, access to hundreds of thousands of pages of the latest securities' and commodities' prices and market reports, as well as fast-breaking news. Subscribers are able to call up, almost immediately, any specific information desired.[21] Cable systems have also developed burglar and fire alarm services and energy control devices for their subscribers.[22]

From the recent explosion of nonbroadcast program offerings on cable television, it is obvious that the horizons of "cablecasting" are not yet visible. Satellite technology has revolutionized the delivery of national programming choices to cable television operators,[23] and the demise of the FCC's restrictive "pay cable" rules in *Home Box Office, Inc. v. FCC*[24] has opened up a major new source of programming for subscribers. At the same time, cable television operators have found that quality local programming attracts viewers.[25] The provision of nonbroadcast programming to subscribers is the future for cable television.

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[21] *Cablevision*, Nov. 6, 1978, at 43.

[22] *See N.Y. Times*, Apr. 19, 1978, at C25, col.1.

[23] The 18 transponders available to cable television on the Satcom I satellite are booked. RCA American Communications, Inc. has proposed to the FCC the launching of a new satellite, Satcom III, with all 24 transponders to be reserved for cable television programming. *See Broadcasting*, Dec. 11, 1978, at 78.

[24] 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). The pay cable rules were but part of an FCC regulatory scheme for cable television that has received extensive criticism. Commentators have found that this regulatory scheme has significantly slowed the development of the cable television industry. *See, e.g.*, Staff of House Subcomm. on Communications, 94th Cong., 2d Sess., Cable Television: Promise Versus Regulatory Performance (Subcomm. Print 1976).

[25] *See, e.g., N.Y. Times*, Apr. 13, 1978, at C22, col.1.

Cable television is thus an emerging element of the electronic press; in no way may it accurately be characterized as merely a "conduit."[26] Increasingly, the large cable television systems are producing their own programming. Even when they purchase programs and program-packages from suppliers, they retain discretion over what they actually carry. And they select and negotiate with program suppliers to assure the proper mix and quality of programming. In no case do they select among competing suppliers merely on the basis of who first walks through the door. Much as television stations switch network affiliations and newspapers switch wire services, cable operators switch program suppliers. As the number and diversity of program suppliers continue to grow, the editorial function exercised in selecting programming will become ever more important.

The provision of attractive nonbroadcast services is critical to the growth of cable television. As the FCC itself has recognized, the provision of these additional services is the necessary condition to cable's expansion into major markets.[27] By undercutting the ability of cable systems to provide these services, the access rules threaten to block cable television's expansion.

The access rules are also basically unfair. The success of a major market cable system, which involves the expenditure of millions of dollars to build and years of effort to attract subscribers, is dependent upon the quality of the nonbroadcast services the system offers. Yet the access rules place this critical function in the hands of third parties, who may be devoid of talent, financial responsibility, and

[26]This is a basic misconception of the ACLU. See Brief for ACLU at 28.

[27]*See Cable Television Report and Order*, 36 F.C.C.2d 143, 149 (1972). Since the elimination of the FCC's pay cable rules, there has been a significant upsurge in cable television franchising activity in the major markets. *See, e.g., TVC*, Oct. 15, 1978, at 44. There is franchising activity today in many of the Nation's largest cities. *Id.*

any long term commitment to the system's success or to the community it serves.[28]

STATEMENT OF INTEREST

Amici include many of the largest cable television operators in the United States. The National Cable Television Association is a nonprofit trade association representing the majority of cable television operators throughout the country. As such, it has represented the cable television industry before the FCC, the Congress, and the courts. The National Cable Television Association and Teleprompter Corporation filed briefs as amici curiae in the Court of Appeals below.

As noted elsewhere in this Brief, amici believe that the access rules seriously threaten the future development of cable television and deprive them of their constitutional rights.[29]

[28]"Midnight Blue," an X-rated program provided to New York City cable subscribers on an access channel, caused a furor until the cable company cancelled the program on the ground that it violated the Commission's rules against obscenity. *See N.Y. Times*, May 14, 1976, at C26, col.1. Whether a cable operator may prevent the delivery of obscene access programming today is unclear. *See* FCC's Petition for a Writ of Certiorari, No. 77-1571, at 15-16 n.15.

[29]Amici do not oppose public participation in programming or public use of cable facilities. Indeed, the cable industry reaffirmed its willingness to provide access to members of the public after the Court of Appeals in this case struck down the Commission's access requirements. *See Broadcasting*, Mar. 6, 1978, at 42. But voluntary provision of access is a far cry from the Commission's mandatory access rules, which give the cable operator no discretion. Newspapers voluntarily make space available for letters to the editor without incurring any obligation to make their pages available to all on a first-come, first-served basis. *Cf. Miami Herald Publishing Co. v. Tornillo, supra.* Similarly, cable operators should be able to make their facilities available to third parties when this serves a real public need, without incurring an obligation to do so in all cases, even when there is no such need.

STATEMENT OF THE CASE

In 1976 the FCC modified rules first adopted in 1972 requiring that certain cable television systems make available channels for the provision of "access" services.[30] The rules as modified provide that "to the extent of its available activated channel capability" each cable system serving 3,500 or more subscribers must "maintain at least one specially designated channel" for "public," "educational," "local government," and "leased" access uses.[31] The rules also require that cable television systems "establish rules requiring first-come, nondiscriminatory access." Under the rules, "[e]ach such system shall have no control over the content of access cablecast programs***."[32]

Although cable television systems may combine public, educational, governmental, and leased access services on one composite channel if demand permits, requests for access channel space must be honored until the "available activated channel capability" is exhausted.[33] Channels are "available" for access use unless they are being used for the retransmission of broadcast signals or the carriage of pay programming. Although a channel may be in use for the provision of origination programming, it is nonetheless

[30]*Report and Order in Docket 20508*, 59 F.C.C.2d 294 (1976), Petitioner's App. at 93.

[31]47 C.F.R. § 76.254(a). The rules permit access services to be combined on one or more channels "[u]ntil such time as there is demand for each channel full time for its designated use." 47 C.F.R. § 76.254(b).

[32]47 C.F.R. § 76.256(b), (d)(3).

[33]When an access channel is used "during 80 percent of the week days (Monday-Friday) for 80 percent of the time during any consecutive three-hour period for six consecutive weeks" another access channel must be provided, to the extent of activated capacity, until all available channels are exhausted. *See* 47 C.F.R. § 76.254(d). When an access channel is used according to this formula, the cable operator has six months to provide another channel, if any are "available." *Id.*

"available" for access.[34] Even pay and retransmission channels may be bumped for access use when necessary to provide at least one access channel on a system. And when a channel is used for access, the operator may not reclaim it to provide programming he would prefer to provide to his subscribers,[35] even if no other channel is available. In sum, the access rules subordinate the cable operator's choice of programming to that of access users.[36]

Midwest Video Corporation and the American Civil Liberties Union petitioned for review of the access rules, and the United States Court of Appeals for the Eighth Circuit set aside the rules as beyond the Commission's jurisdiction. The court noted that "[t]he present access rules strip from cable operators * * * all rights of material selection, editorial judgment, and discretion enjoyed by other private communications media, and even by the 'semi-public' broadcast media."[37] The court continued:

> Cable operators must allow use of their facilities, for transmission toward their paying subscribers, of *any* program material, no matter the quality, interest, relevance, taste, context, beauty, or scurrilousness * * *. They must lease a channel to any person, regardless of business reputation, competence, or financial standing.[[38]]

[34]The Commission did state in footnote to its 1976 *Report and Order* that it did not intend that "established cablecast [origination] services," provided by system operators be "automatically displaced" and that it would "consider each such situation individually on its merits." 59 F.C.C.2d at 316 n.19, Petitioner's App. at 143 n.19. But under the rules it is the burden of the cable operator to obtain a waiver before he may refuse a request for access on the grounds that the only "available" channel is being used for origination services.

[35]*Id.* at 317, Petitioner's App. at 144-5.

[36]See discussion at p. 2, *supra*.

[37]*Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1055-56 (8th Cir. 1978), Petitioner's App. at 73.

[38]*Id.* at 1056, Petitioner's App. at 73 (emphasis in original).

The court also ruled that "the First Amendment overtones, and other constitutional considerations" reinforced the conclusion that the Commission lacked jurisdiction to impose the access requirements.[39]

ARGUMENT

I. THE FCC'S ACCESS RULES ARE NOT AUTHORIZED UNDER THE COMMUNICATIONS ACT.

Despite its own pronouncement that common carrier regulation for cable television nonbroadcast channels would be inappropriate,[40] the Commission has imposed common carrier-type obligations on cable television. The access rules impose the two major prerequisites of communications common carriage: (1) provision of service on an indiscriminate basis to all users, and (2) transmission of "intelligence of [the customer's] own design and choosing." *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976). The Government has conceded that "[t]he access rules in effect impose a limited form of common carriage obligations upon cable operators."[41]

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[39] *Id.* at 1053, Petitioner's App. at 65.

[40] *Clarification of Cable Television Rules*, 46 F.C.C.2d 175, 186 (1974).

[41] Brief for United States in Support of FCC's Petition for a Writ of Certiorari at 16. The Government is wrong, however, to characterize the imposition of common carriage obligations as "limited." Although the Commission has not attempted to regulate cable television under Title II of the Communications Act, 47 U.S.C. §§ 201-33, the Commission does require cable systems to prepare and file with it rules governing the terms, conditions, and rates for the use of access channels (the equivalent of a tariff). *See* 47 C.F.R. § 76.256(d). And the rates charged for leased access are apparently subject to FCC review. *See Report and Order in Docket 20508, supra*, 59 F.C.C.2d at 316, Petitioner's App. at 143; *Cable Television Report and Order*, 36 F.C.C.2d 143, 190, 192 (1972).

It is this conversion of cable operators from transmitters and originators of programming to communications common carriers which most distinguishes the instant case from the situations presented to this Court in *United States v. Southwestern Cable Co.*[42] and *United States v. Midwest Video Corp. ("Midwest Video I")*.[43]

Southwestern Cable and *Midwest Video I* establish that FCC jurisdiction over cable television exists under Section 2(a) of the Communications Act[44] to the extent "reasonably ancillary to the effective performance of [the FCC's] various responsibilities for the regulation of television broadcasting."[45] In each of these cases, jurisdiction is defined by analogy to the Commission's statutorily authorized policies and rules with respect to broadcasting. *Southwestern Cable* affirmed the Commission's authority to regulate cable as necessary to regulate effectively broadcast television. *Midwest Video I* affirmed the Commission's authority to require cable operators to do what broadcasters do — originate programming.

The Commission's access rules break down the regulatory analogy to broadcasting. The rules cannot be justified as necessary to protect broadcasting, *see Southwestern Cable*,

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[42] 392 U.S. 157 (1968).

[43] 406 U.S. 649 (1972). The Government incorrectly asserts that imposition of common carrier responsibilities on a cable system is supported by analogy to the signal carriage rules, which require cable systems to transmit, on request, the signals of local broadcast stations. See Brief for U.S. and FCC at 48. Unlike the random, first-come, first-served basis of the access rules, the signal carriage rules carefully identify what signals must be carried. Moreover, the choice of "must carry" signals under the signal carriage rules is made to protect the broadcast license allocation scheme, which lies at the heart of broadcast regulation. *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 210-18 (1943). As noted at p. 20, *infra*, the access rules are utterly inconsistent with the scheme of broadcast regulation.

[44] 47 U.S.C. § 152(a).

[45] 392 U.S. at 178; 406 U.S. at 663.

or as a complement to broadcasting by defining the duties of cable systems in terms of the normal function of broadcasters, *see Midwest Video I.* Instead, the rules impose obligations on cable operators totally foreign to broadcasting. The common carrier-type regulation contained in the access rules is explicitly withheld from the Commission for use in broadcasting by Section 3(h) of the Communications Act.[46] As noted by the Court of Appeals below, the Commission's access rules "impermissibly intermix[ ] the two fields which Congress expressly kept asunder, by its enactment of § 3(h) of the Act, and its separate treatment of common carriers (Title II) and broadcasters (Title III) in the Act."[47] The FCC has no authority to regulate cable television as a common carrier.[48]

Despite the Government's contention that the access rules were intended to be less burdensome than the mandatory origination rules upheld in *Midwest Video I.*[49] the

[46]Section 3(h) provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h).

[47]*Midwest Video Corp. v. FCC, supra,* 571 F.2d at 1052, Petitioner's App. at 63.

[48]*See Philadelphia Television Broadcasting Co. v. FCC,* 359 F.2d 282, 284 (D.C. Cir. 1966). Notwithstanding the offhand suggestion that access channels, "from a technological point of view, *could* function as common carriers," *American Civil Liberties Union v. FCC,* 523 F.2d 1344, 1350 (9th Cir. 1975) (emphasis added, footnote omitted), the Ninth Circuit's decision cannot be construed as upholding regulation of pay cablecasting as a common carrier activity. The court there held that the Commission's decision not to exercise authority over access channels pursuant to Title II of the Communications Act was itself an action "'reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting.'" *Id.* at 1351 (citation omitted). Since the issue in that case was whether the Commission was obligated to go *beyond* the access rules and adopt affirmative regulations required by Title II, the court's decision must be interpreted as upholding the 1972 rules only to the extent that their validity was not found wanting by reason of the Commission's refusal to incorporate the full range of Title II requirements.

[49]*See* Brief for U.S. and FCC at 7.

access rules are far more radical and have farther reaching effects. By taking away the cable operator's control over nonbroadcast programming, the access rules alter the fundamental nature of cable television in a way that the mandatory origination rules never could have. The Courts of Appeals are in agreement with Mr. Chief Justice Burger that *Midwest Video I* must represent the "'outer limits'" of the Commission's jurisdiction.[50] The access rules go beyond those limits.

Imposition of common carrier-type obligations on cable television is especially inappropriate in view of the correspondence between cablecasting and broadcasting. As this Court recognized in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,[51] when cable systems undertake to originate programs wholly independent of programs they receive off-the-air from broadcasters, sell advertising time and commercials, and interconnect with other cable systems for the purpose of redistributing programming originated on cable television, they are closely akin to broadcasters.[52] Ironically, the Commission's rules, which must be justified as being ancillary to its broadcast responsibilities, permit access users to preempt origination functions of cable operators — those very functions which most closely correspond to broadcasting.[53]

[50]*Midwest Video I,* 406 U.S. at 676 (Burger, C.J., concurring); *Midwest Video Corp. v. FCC,* 571 F.2d at 1038 n.29; *Home Box Office, Inc. v. FCC, supra,* 567 F.2d at 28; *see also National Ass'n of Regulatory Util. Comm'rs v. FCC,* 533 F.2d 601, 615 (D.C. Cir. 1976).

[51]415 U.S. 394 (1974).

[52]*Id.* at 402-05.

[53]Nor may the Government take comfort in the primary difference between cable television and broadcasting, that cable television is not subject to the limitations of the broadcast spectrum. *See* Brief for U.S. and FCC at 30 n.26. Indeed, broadcast regulation finds its primary justification in spectrum scarcity. *See Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 376-77 (1969). Without the same limitations, cable television should be the subject of less regulation, not more.

The Government attempts to justify the mandatory access requirements on the ground that they contribute to the broadcast "objectives of increasing community outlets of expression and increasing programming choices."[54] It is not enough, however, that the objectives of the access rules be similar to objectives in the regulation of broadcast television. The means — as well as the ends — must be those permitted in broadcast regulation. Both the Eighth Circuit and the D.C. Circuit have stressed that the FCC's ancillary jurisdiction over cable is limited to the use of "regulatory tools" permissible for broadcast television regulation.[55] The Courts of Appeals' analysis must be correct: it would be a strange gloss indeed on the Communications Act were the Commission's implied, ancillary responsibilities over cable television to exceed its explicit, primary responsibilities over broadcast television.[56] Congress has carefully and explicitly delimited the scope of the Commission's regulation of broadcasters.[57] If the Commission's responsibilities over cable are to be more extensive, that is a decision to be made by Congress.[58]

[54]Brief for U.S. and FCC at 26.

[55]*See Midwest Video Corp. v. FCC, supra,* 571 F.2d at 1048; *Home Box Office, Inc. v. FCC, supra,* 567 F.2d at 31.

[56]*See, e.g., Home Box Office, Inc. v. FCC, supra.* 567 F.2d at 28; *cf. Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976).

[57]*See* Title III of the Communications Act, 47 U.S.C. §§ 301-397.

[58]Proposed legislation relating to the FCC's jurisdiction over cable television has recently been introduced in Congress. Communications Act of 1978, H.R. 13015, 95th Cong., 2d Sess., 124 Cong. Rec. H5231 (daily ed. 1978).

II. THE FCC'S ACCESS RULES VIOLATE THE FIRST AMENDMENT RIGHTS OF CABLE TELEVISION OPERATORS.

A. The Access Rules Abridge the First Amendment Right of a Cable Operator to Select Speakers of His Choice on Subjects of His Choice.

The FCC's requirement that cable systems make available channels to access users violates the First Amendment because it requires, as the Government has conceded, that the cable operator "transmit communications on its facilities that it might prefer not to."[59] *Miami Herald Publishing Co. v. Tornillo*[60] is squarely on point. In *Tornillo* a unanimous Court struck down a Florida statute requiring that a newspaper provide "access" for a reply by a political candidate attacked in the newspaper. Writing for the Court, Mr. Chief Justice Burger noted:

> [T]he Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which "'reason' tells them should not be published" is unconstitutional.[[61]]

Even if the newspaper would incur no additional expense and would not be forced to forego publication of its own opinion or news to include a "reply," the Court determined that the Florida statute violated the First Amendment.

[59]Brief for U.S. and FCC at 39.

[60]418 U.S. 241 (1974).

[61]418 U.S. at 256, *quoting Associated Press v. United States,* 326 U.S. 1, 20 n.18 (1945).

The Court rejected arguments almost identical to the Government's arguments here that the First Amendment should not apply to the access rules because the rules further "competing First Amendment interests"[62] and because cable television has "the characteristics of a natural monopoly."[63] In response to the argument that access would add to diversity of expression, the Court categorically denied that this could justify the reply statute.[64] The Court also recognized that "'[o]ne-newspaper towns have become the rule, with effective competition operating in only 4 percent of our large cities,'"[65] and that "the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible."[66] Yet the Court refused to balance First Amendment rights against the practical benefits of access, stating:

> However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.[[67]]

[62]Brief for U.S. and FCC at 40.

[63]*Id.* at 45. There is no record support for the Government's statement in its Brief, at 45, that cable television is subject to special physical constraints, like public utilities. Moreover, there are several forms of electronic media, such as broadcast television and subscription television, which have the same capability to deliver programs to a television receiver. In New York City, for example, cable television has competition from 23 broadcast television stations. See Television Digest, 1978 Cable & Station Coverage Atlas, at 67b.

[64]418 U.S. at 251. The Court reaffirmed the point two years later in *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

[65]418 U.S. at 249 n.13 (citation omitted).

[66]*Id.* at 251 (footnote omitted).

Nor is the First Amendment mischief caused by the access rules any less severe than that caused by the reply statute in *Tornillo*. The Government argues that the access rules are less offensive because, unlike the reply statute, they are "unrelated to the content of what the cable operator otherwise transmits."[68] Yet the Court made clear in *Tornillo* that it was resting its decision on the ground that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment."[69] It is every bit as much an infringement on freedom of the press to require a publisher to permit coverage of an issue consciously avoided, as it is to require him to permit a response to a position consciously taken.[70]

[67]*Id.* at 254 (footnotes omitted).

[68]Brief for U.S. and FCC at 40.

[69]418 U.S. at 258.

[70]*See Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 130 (1973). In the *CBS* case, this Court held that broadcasters were *not* required under the First Amendment to permit public access to their facilities. And while the Court declined to extend its determination at that time to "some kind of limited right of access," *id.* at 131, it seems clear that the Court did not envision requiring a broadcaster to devote a substantial amount of its programming to public use on a first-come, first-served basis without control by the broadcaster over content. Nor may this Court's passing reference to the cable access rules in *CBS* be considered any statement as to the legitimacy of those rules, either under the First Amendment or the Communications Act. *See id.*

B. The Access Rules Violate the First Amendment Because They Require Cable Operators to Carry Access Programming Instead of Programming They Might Prefer to Carry.

The FCC argues that the "court of appeals failed to recognize the limited nature of the access rules."[71] But the Commission's access rules are by no means a "limited" restriction on the discretion of cable operators. The rules require that any "available" activated channel must be provided to the first person to request it.[71] If a cable television operator has no vacant channel, he must preempt origination programming to meet an access request, unless he can convince the Commission to waive this requirement.[72] And if necessary to provide at least one composite access channel, the cable operator must preempt pay or retransmission programming.[73] The Commission has made it clear that access programming has "priority."[74] Moreover, once a channel is used for access, the operator may not bump the access programming for programming he would prefer to provide his subscribers.[75] The rules, therefore, operate not only to require the cable operator to publish communications he may prefer not to — itself a denial of free speech — but they also deny the operator the

[71]Brief for U.S. and FCC at 37.

[71]*See* 47 C.F.R. § 76.254(a).

[72]*See* 47 C.F.R. § 76.254(d); *Report and Order in Docket 20508, supra,* 59 F.C.C.2d at 315-16 & n.19, Petitioner's App. at 142-43 & n.19.

[73]*See id.* at 316-17, Petitioner's App. at 145.

[74]*Memorandum Opinion and Order in Docket 20508, on Reconsideration, supra,* 62 F.C.C.2d at 404-05, Petitioner's App. at 195.

[75]*See Report and Order in Docket 20508, supra,* 59 F.C.C.2d at 316, Petitioner's App. at 144-45.

right to publish communications he would prefer to publish.[76]

This preemption of the cable operator's ability to speak, present in this case to a far greater degree than in *Tornillo,* makes the access rules a clearer violation of the First Amendment than the reply statute found unconstitutional in *Tornillo.*

C. Cable Television is Entitled to the Same First Amendment Rights as are Other Media.

The Government attempts to reconcile the access rules with the First Amendment by arguing that cable television is not entitled to the same First Amendment rights as are other media. This contention raises issues of fundamental importance, because cable television has the potential to become one of the primary vehicles for the dissemination of information in this Nation.

In support of its position that cable television operators are not entitled to the same First Amendment rights as are newspaper publishers, the Government points to certain similarities between cable television and other electronic

[76]While cable television is not limited by the broadcast spectrum, the number of channels available for programming to subscribers is limited by cost factors. Although coaxial cable used by a cable television system will transmit 30 or more television channels at the same time, television sets are designed to receive only 12 VHF channels, and unless the cable television system employs expensive set converters, the practical number of channels that can be received by a subscriber is 12. Even in the newer systems, which generally provide converters, the explosion of nonbroadcast services means that editorial selections will have to be made among available programming. This Court recognized in *Tornillo* that "as an economic reality" a newspaper cannot proceed "to infinite expansion of its column space to accommodate the replies that a government agency determines." 418 U.S. at 257. Neither can a cable television system continually add channel capacity to accommodate undesirable programming in order also to provide preferred programming.

media. Because cable television has some of the physical characteristics of a public utility and functions in some respects like a broadcast station, the Government argues, cable should be subject to governmental restraints on its press freedoms. This attempt to create different, and inferior, First Amendment rights based on the technology used to publish portends an enormously dangerous erosion of the freedom of the press.

It is true, of course, that cable television delivers information by wire to an electronic receiver, while newspapers and other print media currently record and deliver an impression on paper. But it is not only probable, it is virtually certain, that in the next decade news and other information will be transmitted to the home by electronic means, and the technological differences drawn by the Government between newspapers and cable television will blur beyond reasonable distinction. Already, UPI, AP, and Reuters supply news programming to cable television, and cable systems carry live coverage of government proceedings.[77]

That broadcasters are subject to special First Amendment analysis bears no relevance here. Broadcast television licensees are subject to affirmative duties because the inherent limitations of the broadcast spectrum have required some governmental regulation of who may use the airwaves. Granted an exclusive license to use a specified portion of a scarce public resource, broadcasters must act as public trustees.[78] Cable television is not subject to the limitations of the broadcast spectrum.[79] Nor has the FCC

[77] See pp. 3-4, *supra*. The D.C. Circuit found no "constitutional distinction" between newspapers and cable television in *Home Box Office, Inc. v. FCC, supra*, 567 F.2d at 46. The Eighth Circuit reached a similar conclusion in this case below, *Midwest Video Corp. v. FCC*, 571 F.2d at 1056.

[78] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969).

[79] The American Civil Liberties Union concedes this point. Brief for ACLU at 37.

awarded cable television any rights to exclusive use of public resources.

Even if the Government were correct that cable television operators' First Amendment rights should be similar to broadcasters', it would not justify the access rules. The access rules go far beyond broadcasting regulation. Moreover, the Government concedes that whether the access rules could be imposed on broadcasters is an "open question."[80] We believe that even this characterization goes too far. Justices Stewart and Douglas both stated that imposition of even the limited right of access sought by the petitioners in the *CBS* case would violate the First Amendment rights of broadcasters.[81] And we cannot imagine that this Court would countenance the sweeping preemption of broadcasters' editorial discretion that the access rules impose on cable television operators.

The First Amendment rights of common carriers bear no more relevance here than do the First Amendment rights of broadcasters. Common carriers enjoy no First Amendment rights for the messages they carry, not because the messages originate with others,[82] but because common carriers by definition have no control over message content.[83] If cable television systems were common carriers, then their First Amendment rights would be limited. But cable television systems, which are extensively engaged in their own cablecasting, are not common carriers — except under the access rules. The Commission may not, of course,

[80] Brief for U.S. and FCC at 29 n.24.

[81] *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., supra*, 412 U.S. at 144-46 (Stewart, J., concurring), 150-52 (Douglas, J., concurring).

[82] *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386-87 (1973). Of course, newspapers enjoy First Amendment protection for wire service stories, as broadcasters do for network programming.

[83] See p. 10, *supra*.

require someone to behave as a common carrier, and then use that behavior to limit the putative carrier's First Amendment rights.

We submit that requiring a cable television operator to give up all editorial control over a portion of his bandwidth cannot fairly be distinguished from requiring a newspaper to reserve a portion of its paper to be used by others as they see fit. A channel provided by a cable operator to subscribers can no more easily be disassociated from the other channels he provides than a newspaper can disavow responsibility for what an advertiser wishes to have printed on the back page. Just as a newspaper publisher may wish to decline to print advertisements for X-rated movies, so too may a cable operator prefer not to have the same films transmitted to his subscribers over an access channel.

III. CONCLUSION

Each medium of expression develops its own image. It can deliver "all the news that's fit to print," or it can cater to baser human interests. Emerging from restrictive FCC regulation of nonbroadcast programming sources,[84] the cable industry is rapidly moving toward the development of its programming function. The access rules threaten to assign control of this development to others on a random, first-come, first-served basis. The FCC may not, we submit, under the Communications Act or the First Amendment, deny this authority and responsibility to cable operators.

We do not contend that cable operators will always satisfy some ideal of quality or public benefit. But the cable operator, with a massive investment in plant and good will, has a strong incentive to act responsibly. The cable operator needs the same opportunity to exercise his discretion — and occasionally to be wrong — as the owner of any other mass medium.

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[84] *See Home Box Office, Inc. v. FCC, supra.*

Amici respectfully request this Court to hold that the FCC exceeded its constitutional and statutory authority in adopting its access regulations, and to affirm the Court of Appeals' rejection of those regulations.

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